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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 1278

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE SPERRY AND HUTCHINSON COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (App. III, 387-403) is reported at 432 F.2d 146. The opinion of the Federal Trade Commission (App. I, 137-190) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals (App. III, 404) was entered on September 29, 1970. On December 22, 1970, Mr. Justice Black extended the

time for filing a petition for a writ of certiorari to and including January 27, 1971. The petition was filed on the latter date, and granted on March 29, 1971 (App. III, 405). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent "unfair methods of competition * * * and unfair or deceptive acts or practices," is limited to conduct which violates the letter or spirit of the antitrust laws.

2. Whether decisions under state law in private litigation holding that commercial restraints which the Commission seeks to prevent are lawful, foreclose the Commission from declaring such restraints to be unfair within the meaning of Section 5.

STATUTE INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 717, 719, as amended, 15 U.S.C. 45(a), provides in part:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
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> * * * *
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> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

On November 15, 1965, the Federal Trade Commission issued a three-count complaint charging the Sperry and Hutchinson Company ("S&H"), the nation's largest trading stamp company, with violating Section 5 of the Federal Trade Commission Act. Count III, which is at issue here,[1] challenged S&H's practice of suppressing individually and in combination with other trading stamp companies, the free and open redemption and exchange of its S&H green stamps. Count III alleged specifically that S&H had suppressed independent trading stamp exchanges, "unfairly to the detriment of the persons engaged in such business * * * and unfairly to the detriment of the members of the consuming public who have thereby been deprived of the opportunity of exchanging one type of trading stamp for another in order to facilitate their redemption;" had unfairly denied the public the opportunity to redeem stamps through persons other than S&H; and had unjustly interfered "with the right of the consuming public to enjoy the full use of their personal property" (App. I, 8-9).

The Commission's hearing examiner sustained only the portions of the complaint charging a combination of S&H and others (App. I, 23-84). The Commission, however, sustained the entire complaint and

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[1] Counts I and II dealt with S&H's individual and collective action to prohibit retailers who dispense S&H stamps from giving more than one stamp for each ten cent purchase. The Commission held against S&H on these counts, and S&H did not challenge the decision on them in the court of appeals.

issued a cease and desist order (App. I, 126-130) against the unfair practices, including the restriction of free and open redemption and exchange. The court of appeals ruled that the Commission had exceeded its authority under Section 5 with respect to Count III and set aside the part of its order dealing with redemption and exchange.

A. S&H and the Trading Stamp Industry

Trading stamps—small pieces of gummed paper about the size of postage stamps—have been employed in retail selling since the turn of the century. They are traditionally purchased from trading stamp companies by retailers, who issue them to consumers in proportion to their purchases. When the stamps have been collected in sufficient numbers and pasted in books, consumers may redeem them, ordinarily for merchandise, at stamp company redemption centers.

Within the past 20 years, trading stamps have achieved a significant role in retailing. In 1964, the various trading stamp companies issued approximately 400 billion stamps to more than 200,000 retail establishments. The cost of the stamps to retailers was $800 million; the volume of retail sales in connection with which stamps were issued was $40 billion (App. I, 105).

A primary vehicle for trading stamps is the retail food business.[2] From 1950 to 1962, the share of re-

[2] Nearly 62 percent of S&H's revenue comes from supermarkets and other food stores; service stations account for 21.2 percent (App. I, 107-108).

tail grocery store sales with which trading stamps were issued rose from one percent to 47 percent (App. I, 105). All major supermarket chains dispense stamps in at least some of their stores (App. I, 110-111).[3] About 50 percent of the stamps issued to consumers are issued in connection with grocery sales (App. I, 105).

The trading stamp industry is highly concentrated. While there are approximately 400 trading stamp companies, most are very small. In 1964 six companies accounted for 83 percent of the stamps issued and 88 percent of the dollar volume received. S&H, with 38 percent of the stamps issued, and 40 percent of the dollar volume received, is by far the largest trading stamp company. Its share of the market is almost three times that of its closest rival, and more than ten times that of the sixth largest company in the industry (App. I, 110, 114).

Thirty-five million American households save trading stamps (App. I, 151), frequently accumulating more than one brand. More than 60 percent of all consumers save S&H green stamps (App. I, 113).

B. Redemption and Exchange

When a consumer has at least one full book of S&H green stamps,[4] she may redeem stamps for mer-

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[3] In several geographical areas the number of food stores dispensing stamps is well in excess of 70 percent of the total stores in the market. In the Dallas-Fort Worth market, for example, 97 percent of the food markets dispense stamps; in Salt Lake City, 86 percent; and in Miami, 79 percent. *Ibid.*

[4] A full book contains 1,200 stamps. Its average cost to the retailer is $2.68 and its average retail value is $3.00. No

chandise at redemption centers which S&H maintains throughout the country (App. I, 106, 108).[5] S&H offers approximately 2,000 articles (App. I, 108), which constitute, in the words of the company's vice-president for corporate research, "a limited line of staple gift type items" (App. III, 349).

Not all stamps are redeemed. Of the stamps issued by S&H between 1914 and 1964, 156 billion (or 130 million filled books of 1200 stamps), or about 14 percent, remained outstanding at the end of 1964 (App. I, 109, 141). Since the retail value of each book is $3.00, the value to the consumer of these unredeemed stamps is approximately $390 million.

S&H, like other trading stamp companies, attempts to limit the redemption and exchange of its green stamps. A "notice" on the inside cover of the stamp saver book advises the consumer that S&H retains title to the stamps "at all times" and that "[t]he only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption" (App. II, 230).[6] S&H's contract with its licen-

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item may be secured for less than one book (App. I, 106, 108-109).

[5] Sixteen states require that the stamp saver be given an option to redeem in cash, and two require redemption in cash only. Kansas prohibits the issuance of stamps in connection with sales of merchandise and Washington imposes a heavy tax on merchants who use stamps redeemable in merchandise (App. I, 108).

[6] The notice also states that S&H will, upon application, give the stamp saver permission to give the stamps "to any other bona fide collector" (App. II, 230). "Not a great many"

sees also provides that title to the stamps shall remain in S&H, although the company does not pay taxes on issued stamps in the hands of its licensees or replace stamps stolen from them (App. I, 110).

Consumers have not strictly adhered to the restrictions on exchange and redemption. In 1960, for example, 20 percent of all stamp savers traded with other collectors, usually without authorization (App. I, 110). They have, moreover, patronized trading stamp exchanges.[7] These small independent businessmen buy and sell trading stamps and, for a small fee, exchange them.[8] They usually stock a wide variety of different brands, both local and non-local (*e.g.*, App. III, 16—50 varieties). The exchanges also maintain stamp company catalogs, so that the consumer can more readily ascertain the cost and availability of merchandise from the various companies (App. II, 465; App. III, 119-121, 156). Consumers also have redeemed their stamps at certain

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consumers actually ask for this permission, however (App. III, 316). There is no reference to S&H's policy with respect to transferability printed on the stamps themselves. The Commission found that most consumer witnesses were "doubtful or uninformed" regarding that policy (App. I, 109-110).

[7] Private "swapping" frequently is not possible because the range of available brands is inadequate (App. III, 117-118)..

[8] The typical fee for exchange of one book of stamps for another ranges from 30 to 50 cents (App. I, 170). Simple purchase at an exchange of a book of S&H stamps, worth $3.00 in retail merchandise, costs between $2.40 (App. III, 166) and $2.75 (App. II, 467). The exchanges do not sell stamps to retailers for reissuance to the public (App. I, 169).

retail establishments which have offered a variety of goods and services for them.[9]

Consumers evidently desire to exchange, purchase, or sell stamps for a variety of reasons. Many consumers shop at several different stores, which issue different brands of stamps, rather than shopping only at stores which issue the same brand. Eighty percent of S&H stamp savers collect at least one other brand, while nearly ten percent save three or more brands (App. II, 525). Frequently, consumers wish to consolidate different brands they have collected into one brand. The consumer who is able to consolidate, or to purchase a particular brand, has greater latitude regarding the merchandise she obtains, as well as the time and place she obtains it.

It may take a consumer "forever to get a book" of stamps she infrequently receives (App. III, 91). By consolidation she can more quickly obtain value for these stamps. Similarly, if an individual wishes to obtain a major item, she will have enough books sooner if she can consolidate all her stamps into one brand (App. III, 101).[10] Merchandise, or a particu-

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[9] See, *e.g.*, App. II, 237 (department store in Louisiana), 251 (food for the poor in New Jersey), 277-278 (used cars in Texas), 279 (jewelry in Connecticut), 355 (gift shop in Ohio), 358 (pianos in Colorado), 360-361 (vacuum cleaners in Colorado); App. III, 202-206 (department store in Pennsylvania), 214-257 (department store in Maryland).

[10] Charities which seek to pool stamps donated to them in order to obtain a major item also are assisted by consolidation (App. III, 35, 121, 179-183). While S&H does permit and encourage pooling by charities (App. I, 110), it opposes consolidation by them of various stamps into a brand (App. III, 124).

lar brand, which is desired may be available at only one redemption center (App. II, 470-471; App. III, 56-57, 101-102, 153-154). Or, an item may cost fewer books at one center than another (App. II, 465; App. III, 56, 101).

The ability to exchange stamps thus enables the consumer to shop comparatively. A certain redemption center may be much more convenient for the consumer and she may prefer to consolidate her stamps into the brand of that company rather than journeying to different centers located in various areas (App. III, 15, 51, 101, 206-208, 238-239).

The consumer may also need a particular item at a particular time; "the birthday present, the bike or the wedding gift that they have to have for tomorrow" (App. III, 102). At gift-giving times, such as Christmas, the need to consolidate or purchase additional stamps is particularly great (App. III, 153). As one witness testified: "Trading stamp companies offer a variety of premiums that make ideal Christmas gifts, and it is a practice among quite a number of people to save their stamps until Christmas time * * * and they run into problems of proper numbers of stamps, at the proper redemption centers * * *" (App. III, 24).

By exchange, sale, or purchase, the consumer may also make use of odd numbers of stamps from which she would otherwise obtain no value. Many stamp companies operate only in certain geographical areas (App. III, 15-16, 158-159). Consumers who move to a new area may find that stamps they formerly saved are not issued there. They may therefore wish

to exchange their old stamps for a brand which is issued in their new area (App. II, 469; App. III, 14), or to purchase additional stamps of the brand they previously saved in order to be able to redeem them (App. III, 10).

The ability to redeem stamps in cash or merchandise not offered at redemption centers also enhances the usefulness of stamps to consumers. A consumer occasionally desires to convert his trading stamps into cash. This occurs most frequently when the consumer is moving to an area where trading stamps are not issued. For example, military men being sent overseas may wish to get some use out of their stamps before they leave (App. III, 9-10, 23; see also App. III, 103).

Ordinary retailers who offer to redeem trading stamps will frequently afford the consumer a wider or different range of merchandise from which to select. Department stores typically carry merchandise in a range of colors, styles, brands and prices "which is substantially greater than the choice available from the S&H catalog" (App. II, 527). Other stores may offer certain necessities—such as inexpensive underwear and clothes for children and infants (App. III, 209, 233, 245) or work shoes (App. III, 218), which poor people need more than merchandise with a minimum value of $3.00 which is available from redemption centers, see generally App. III, 202-257.

S&H has moved vigorously, and quite successfully, to suppress the activities of stamp exchanges, and to stop retailers from redeeming S&H stamps for mer-

chandise (App. II, 237-446, 536-567). A letter threatening immediate court action most often has been sufficient to cause termination of the activity (*e.g.*, App. II, 317-319, 389-390). Respondent has also obtained injunctions under state law against exchange and redemption by these businesses (App. II, 588-592). Between 1957 and 1965, S&H sent approximately 140 warning letters to stamp exchanges and 175 warning letters to merchants redeeming S&H stamps; it also filed as many as sixteen complaints seeking injunctions (App. I, 121).

C. The Commission Decision

The Commission ruled that respondent's suppression of free and open redemption and exchange of trading stamps was an unfair practice in violation of Section 5 of the Federal Trade Commission Act. It stated that its responsibility under the Act "is simply to determine, in light of the public interest, whether or not the practices as alleged are unfair within the meaning of Section 5 * * *." (App. I, 149.) The Commission noted that " 'unfair' methods, acts and practices * * * are not limited to violations of the Sherman Act, as respondent's argument appears to suggest. * * * [T]he Commission * * * may find a violation of the Act without a showing of such anticompetitive effects as would be required under the antitrust laws." (App. I, 150, 151.)

The Commission then examined "all the facts of record" to determine whether S&H's actions were "unfair" (App. I, 151). It found (as had its hearing examiner to whose findings on the issue it re-

ferred) that respondent's suppression practices "disadvantaged the stamp collecting consumers who did not have, after respondent's actions, the same freedom of choice in the disposition of trading stamps" (App. I, 176); that those practices, enhanced in effectiveness by respondent's dominance in the trading stamp market, "tended to eliminate the operations of a whole class of businessmen [the stamp exchanges] who provided * * * a useful and valuable function" (App. I, 177); and that they eliminated a "competitive reaction" to firms issuing stamps by merchants who offer to redeem stamps for their own merchandise in order to compete with the closed trading stamp system (App. I, 178).

The Commission rejected respondent's asserted business justifications for its restrictive practices (see *infra*, pp. 31-32), pointing out that it had offered no "hard facts," but only "broad generalities" from its own officers and employees in support of them. The Commission further held that even if S&H had put forth legitimate business reasons, the adverse effects of its practices would have outweighed them (App. I, 174, 180).

The Commission accordingly concluded that S&H's suppression practices "are to the prejudice and injury of the public, have unreasonably restrained, injured and impaired competition, and thereby constitute unfair methods of competition in commerce and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act" (App. I, 126). It ordered respondent to cease and desist, independently or with other trading stamp companies, from

suppressing the "free and open redemption or exchange of trading stamps" by exchanges or retailers, or otherwise interfering with "the freedom of any retailer to whom the respondent has issued trading stamps or any person to whom such retailer dispenses or transfers such respondent's trading stamps, to alienate such stamps" (App. I, 128).[11]

D. The Court of Appeals Decision

The court of appeals reversed (Wisdom, J., dissenting), holding that the Commission's order "exceeds its statutory authority" (App. III, 394). "To be the type of practice that the Commission has the power to declare 'unfair,'" the court ruled, an act must be either "(1) a per se violation of antitrust policy; (2) a violation of the letter of * * * [the antitrust laws]; or (3) a violation of the spirit of these [laws] * * * as recognized by the Supreme Court of the United States" (App. III, 392). For there to be a violation of the "spirit" of the antitrust laws, the court continued, the allegedly illegal practice must be one which, when "full blown," would violate the antitrust laws or have the characteristics of an antitrust violation (App. III, 393). It reasoned that "Congress could not have intended to vest the Commission with such broad discretion as to allow it to label a restraint 'unfair' without applying some

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[11] The Commission's order was expressly made inapplicable to any practice relating to the "reissuance" of S&H stamps. Thus, S&H was not foreclosed from preventing a nonlicensed retailer from acquiring S&H stamps and redispensing them with the sale of goods or services (App. I, 129, 180).

judicial guidelines in making their findings" (App. III, 393).

Applying these limits, the court concluded that the Commission had been "unable to point to any antitrust law which S&H has violated either in letter or spirit" (App. III, 394). Mere injury to the business of the exchanges was not enough, especially since the activities of the exchanges have "time and time again * * * been declared unlawful" by courts under state law (*ibid.*).

Judge Wisdom, in his dissent, argued that Section 5 empowers the Commission to act "whenever it uncovers [trade] practices which are undesirable or inimical to the public interest" (App. III, 398). Reviewing the legislative history of the Act, as well as the decisions of this Court, he asserted that "the Commission did exactly what Congress intended it to do—that is, decide whether S&H's practices were unfair on the facts before it in the light of the public interest" (App. III, 401-402). Judge Wisdom concluded that the record supported the Commission's finding that "S&H's suppressive activities have a detrimental effect on consumers and on competition" and that [t]hese effects outweigh the damage to * * * [S&H] that will be caused by the Commission's order" (402). Judge Wisdom also disagreed with the majority on the application of the Section 5 standard which it employed. He suggested that respondent's actions in restraining retailers from redeeming green stamps for their merchandise and eliminating entirely the stamp exchanges violated the letter or spirit of the antitrust laws (App. III, 400-402).

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that the authority of the Commission under Section 5 of the Federal Trade Commission Act is limited to violations of the letter or spirit of the antitrust laws. The Act gives the Commission comprehensive power to prevent trade practices which are deceptive or unfair to consumers, regardless of whether they also are anticompetitive.

Congress—in passing the Act in 1914 and amending it in 1938 to establish firmly the Commission's power to act specifically on behalf of the consumer—wisely made no attempt to define the term "unfair," or to enumerate the trade practices which were within the ambit of Section 5. It realized that no catalog of unfair practices could ever be sufficient to protect American businessmen or consumers from all possible harmful or oppressive trade practices in an evolving economy. It therefore empowered the Commission to apply Section 5 in a dynamic and flexible manner to keep pace with contemporary conditions.

The Commission, exercising its broad responsibility, has taken action against a gamut of practices which were unfair to consumers or competitors. It properly exercised its authority in this case to order respondent to cease its practice of restricting the free and open redemption and exchange of trading stamps because that practice is unfair to both consumers who receive stamps and businessmen who offer to exchange or redeem them.

There is ample support in the record for the Commission's finding that respondent's restrictive re-

demption policy is oppressive to consumers because it deprives them of the opportunity to obtain the maximum value for stamps they have received. Retailers dispense stamps to consumers in proportion to their purchases. Consumers must collect stamps if they are to obtain full benefit from their expenditures. Free and open redemption and exchange permits, as the record shows, consumers to maximize the benefits from their stamps and, hence, from these expenditures.

The record similarly supports the conclusion that respondent's restrictive practices are unfair to trading stamp exchanges and to retailers who offer to redeem stamps for their merchandise. Both perform an important service to consumers. But, the evidence shows, the exchanges literally cannot survive economically unless they can buy, sell, and trade green stamps, the most popular brand. And retail merchants are deprived of a means of competing with the closed trading stamp system by these practices.

The Commission also correctly concluded that the business justification offered by respondent for its restrictive practices was insubstantial. There was no concrete evidence that suppression of free and open redemption and exchange is necessary to achieve legitimate business objectives. Available evidence on the likely effect of elimination of respondent's restrictive policy, in fact, suggested that its business would not suffer as a result.

The Commission was, finally, not bound by decisions under state law granting injunctions in favor

of respondent against unauthorized trading stamp activity. It is firmly established that federal regulatory decisions may override state policies. In this case, moreover, there is no uniform state policy approving restrictions on the use of trading stamps. To the contrary, as many as twenty states have enacted regulatory measures, such as requiring stamp companies to permit redemption in cash, which prevent them from applying certain restrictive policies. Moreover, many of the decisions upon which respondent relies dealt primarily with reissuance of stamps by merchants who were not licensed to dispense green stamps and obtained them from third parties. The Commission's order, however, specifically does not preclude respondent's efforts to prevent this practice.

The Commission was, in sum, justified—after examining the impact of respondent's practices upon the consuming public, stamp exchange operators, and retailers who offer to redeem green stamps, as well as the prospective effect of elimination of those practices upon respondent's business—in concluding that the restrictive practices were unfair under Section 5.

ARGUMENT

I. The Commission's Comprehensive Authority Under Section 5 To Prevent Unfair Acts Or Practices Is Not Confined To Those Which Violate The Letter or Spirit Of The Antitrust Laws.

The court of appeals adopted an erroneously restrictive view of the Commission's power under Section 5 of the Federal Trade Commission Act. Its

authority is not limited, as the court ruled, to prohibiting conduct which violates the "letter or spirit" of the antitrust laws. The Commission has, rather, a comprehensive mandate under Section 5 to prevent unfair methods of competition and unfair or deceptive acts or practices. 15 U.S.C. 45(a). It is firmly established, by the legislative history of the Act and the Wheeler-Lea Amendment to the Act, as well as by decisions of this Court, that this mandate extends to trade practices which are unfair to consumers, irrespective of whether they also are anticompetitive.

1. Congress, when it created the Federal Trade Commission in 1914, invested that administrative body with a continuing responsibility to prevent "unfair methods of competition." Congress intentionally refrained from attempting to define that phrase or to enumerate the practices which were within its scope, preferring to permit the Commission to develop its meaning, in the light of its experience, to keep pace with changing competitive conditions. As the Senate Committee Report explained (S. Rep. No. 597, 63d Cong., 2d Sess., p. 13):

> The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illi-

> nois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into law it would be quite possible to invent others.

See also H.R. Rep. No. 1142, 63d Cong., 2d Sess., pp. 18-19 (conference report).

This Court, in *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, interpreted the Commission's power to prevent unfair methods of competition quite narrowly, ruling, in effect, that it extended only to practices which were actual antitrust violations or which were then commonly understood by the business community to be unfair. 253 U.S. at 427-428. Mr. Justice Brandeis dissented, contending essentially that Congress had not intended to limit the Commission's authority by such a static and restricted conception of unfair methods of competition. The Court subsequently "rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis * * * that the Commission has broad powers to declare trade practices unfair." *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 320-321. See, *e.g.*, *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 694.

The decision in *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, was significant in the developing recognition of the breadth of the Commission's power. The Commission found respondent's use of "break and take" packages in the sale of penny candy to be an unfair method of competi-

tion. Certain packages of candy entitled the purchaser to a prize or money. The candy itself was generally smaller or inferior to that available at the same price in "straight" packages. The Commission found that use of break and take packages in selling candy was an unfair method of competition because it was "a lottery or gambling device" by which consumers, especially children, were enticed to buy such candy rather than straight goods. 291 U.S. at 308. It concluded that "the sale or distribution of candy by lot or chance is against public policy" (*ibid.*) and that competitors who had refused to employ break and take packages had unfairly been placed at a competitive disadvantage.

The respondent, relying upon *Gratz*, argued that the Commission had exceeded its power because "the practice * * * does not fall within any of the classes which this Court has held subject to the Commission's prohibition," such as those involving fraud or deception. 291 U.S. at 309. The Court, however, explicitly rejected this position (291 U.S. at 310):

> Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftmenship to have restricted the oper-

ation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.

2. The Wheeler-Lea Amendment to the Federal Trade Commission Act in 1938, 52 Stat. 111, expanded the authority of the Commission even further. By that amendment, Congress added to the Commission's power to prevent unfair methods of competition the further power to prevent "unfair or deceptive acts or practices." The legislative history emphasizes the comprehensive nature of the Commission's mandate to protect the public from unfair trade practices.

The Court had placed one significant limitation on the Commission's authority under Section 5 prior to that amendment. In *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, it ruled that the Commission lacked jurisdiction to prevent unfair practices, even though prevention of them was in the public interest, unless they also had an adverse impact upon competition. It stressed that the purpose of the Federal Trade Commission Act, as well as the Sherman and Clayton Acts, was "to protect the public from abuses arising in the course of competitive * * * trade," 283 U.S. at 647. The Court found it "impossible * * * to conclude that Congress intended to vest the Commission with the general power to prevent all sorts of unfair trade practices in commerce apart from their actual or potential effect upon

the trade of competitors," 283 U.S. at 651. The Court pointedly suggested that "[i]f broader powers be desirable they must be conferred by Congress," 283 U.S. at 649. Congress accepted this invitation by adding "unfair or deceptive acts or practices" to the Commission's jurisdiction so that it could fully protect "consumers as well as * * * competitors." *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 384.

The House Report on the bill noted that "[t]he experience of the Commission has demonstrated the need of broader powers," since the Act had been "construed as if its purpose were to protect competitors only and to afford no protection to the consumer without showing injury to a competitor." H.R. Rep. No. 1613, 75th Cong., 1st Sess., pp. 2-3. It concluded that "the proposed amendment * * * makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer * * *." *Id.* at 3.

The Senate Report similarly objected that *Raladam* precluded the Commission's acting against unfair trade practices that do not injure a competitor "no matter how badly the public may be in need of protection from said deceptive and unfair acts." S. Rep. No. 221, 75th Cong., 1st Sess., p. 3. "Under the proposed amendment," the Report continued, "the Commission would have jurisdiction to stop the exploitation or deception of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices." *Ibid.*

Comments in the Congressional debate, which centered more around proposed amendments dealing with misleading advertising than the addition to Section 5, conveyed the same message. Congressman Lea's explanation was typical, "[T]he principle of the act is carried further to protect the consumer as well as the competitor. * * * [W]e go further and afford a protection to the consumers of the country that they have not heretofore enjoyed." 83 Cong. Rec. 391-393; see also 83 Cong. Rec. 395 (Rep. Wolverton); 83 Cong. Rec. 397 (Rep. Reece); 83 Cong. Rec. 401 (Rep. Halleck); 83 Cong. Rec. 3290 (Sen. Wheeler).

3. It is true, of course, that the "broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts." *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 321. But this fact in no way lessens the power of the Commission—which it has consistently exercised and which the courts have fully recognized—to take action to protect consumers from unfair or deceptive practices. The *Keppel* case firmly established that power although it was necessary, prior to the Wheeler-Lea Amendment, also to show harm to competitors. As *Keppel* and early cases dealing with deceptive practices (e.g. *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67; *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483) illustrate, a particular practice which is harmful to consumers may also have an adverse impact upon competition. The precise point of the

Wheeler-Lea Amendment, however, was to remove the need for proof of this additional element.

The Commission has, as Congress anticipated when it refrained from attempting to enumerate the conduct covered by the Act, sought to prevent a wide range of unfair or deceptive acts or practices. Since *Keppel*, this Court has not specifically considered a case, like the present one, in which the claim of unfairness is not based essentially upon alleged deceptiveness. But its approach in deceptive practice cases upholding the Commission's "influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations," *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, applies equally to acts or practices whose unfairness stems essentially from other factors. See also, *Federal Trade Commission* v. *Mary Carter Paint Co.*, 382 U.S. 46. The language of the statute is disjunctive—unfair *or* deceptive.

The courts of appeals have recognized the Commission's broad authority under Section 5 to prohibit unfair practices that are not deceptive. The condemned acts or practices whose unfairness stemmed from factors other than or in addition to deceptiveness include: sale of goods by lottery or other games of chance (*Goldberg* v. *Federal Trade Commission*, 283 F. 2d 299 (C.A. 7); *Lichtenstein* v. *Federal Trade Commission*, 194 F. 2d 607 (C.A. 9)); delivery of goods which were not ordered or attempting to force the customer to accept substitutes (*National Trade Publications Service, Inc.* v. *Federal Trade Commission*, 300 F. 2d 790 (C.A. 8); *Norman Co.*,

40 F.T.C. 296); coercing payment, by threats to sue and other harassing tactics, for delivered goods which were not ordered or which were different in quantity or quality from those ordered (*Federal Trade Commission* v. *Consumers Home Equipment Co.*, 164 F. 2d 972 (C.A. 6); *Dorfman* v. *Federal Trade Commission*, 144 F. 2d 737, 739-740 (C.A. 8)); refusing to reassemble furnace immediately and without waiver of liability to company, whose employee had represented himself as a government inspector and had dismantled furnace without owner's permission (*Federal Trade Commission* v. *Holland Furnace Co.*, 295 F. 2d 302 (C.A. 7)); commercial bribery and "payola" (*Federal Trade Commission* v. *Grand Rapids Varnish Co.*, 41 F. 2d 996 (C.A. 6); *Bernard Lowe Enterprises, Inc.*, 59 F.T.C. 1485); and other forms of interference with the business of a competitor (*Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468 (C.A. 2); *Hastings Mfg. Co.* v. *Federal Trade Commission*, 153 F. 2d 253 (C.A. 6)). See, also, *Zlotnick the Furrier, Inc.*, 48 F.T.C. 1068, and *Interstate Home Equipment Co.*, 40 F.T.C. 260 (refusing to return deposits or make refunds).

The Commission has recently increased its efforts, particularly under its rule-making authority (15 U.S.C. 46(g)), to prevent practices which are unfair to the consumer in various ways, although they are not necessarily deceptive. Cf. Cox, Fellmeth & Schulz, *The Consumer and The Federal Trade Commission; Report of ABA Commission To Study the Federal Trade Commission.* It has, for example, is-

sued rules against the mailing of unsolicited credit cards, 16 C.F.R. 421,[12] and the operation of games of chance in the food retailing and gasoline industries, 16 C.F.R. 419. It has proposed significant rules regarding the customer billing practices of credit card issuers and other retail establishments, 16 C.F.R. 430 (Proposed), 35 Fed. Reg. 15842 (Oct. 8, 1970), establishing a period during which purchases of goods sold door-to-door may rescind their purchase, 16 C.F.R. 429 (Proposed), 35 Fed. Reg. 15164 (Sept. 29, 1970), 36 Fed. Reg. 1211 (Jan. 26, 1971), and permitting purchasers by installment contract to raise defenses which would be available against the seller in actions by third parties to whom their notes have been assigned, 16 *C.F.R. 433 (Proposed)*, *36* Fed. Reg. 1211 (Jan. 26, 1971). See *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission*, 423 F. 2d 423 (C.A. 4), certiorari denied, 400 U.S. 828 (affirming Commission order, issued in complaint proceedings, requiring disclosure by seller that promissory note may be assigned to third party against whom defenses may not be available). See also, *Philip Morris, Inc.*, 3 CCH Trade Reg. Rep. ¶ 19548, p. 21,620 (Dkt. No. 8838, complaint issued, March 12, 1971) (alleged unfair practice, because of health hazard, of distributing sample razor blades in newspaper advertisements).

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[12] The rule was rescinded after the enactment of P.L. 91-508, 84 Stat. 1126, which amended the Truth in Lending Act, 15 U.S.C. (Supp. V) 1601, *et seq.*, to prohibit issuance of credit cards except upon request. 36 Fed. Reg. 45 (Jan. 5, 1971).

The Commission's recent efforts to protect consumers against unfair practices emphasize the importance of reaffirming its traditional authority over such matters. The narrow view of the agency's powers taken by the court of appeals is inconsistent with the language and history of the statute and the consistent pattern of judicial decisions, and would serious impede the Commission in the performance of this important aspect of its work.

II. The Record Supports The Commission's Finding That S&H's Policy Of Restricting Redemption And Exchange Of Its Trading Stamps Is An Unfair Act Or Practice In Violation Of Section 5.

Judicial review of Commission action under its comprehensive Section 5 power "is limited to determining whether * * * [its] decision has 'warrant in the record' and a reasonable basis in law.'" *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367. As we have argued, the Commission's power extends to practices which are unfair, regardless of whether they are also anticompetitive. The Commission, accordingly, had a reasonable basis in law for examining the consequences of those practices to the consuming public, as well as to stamp exchange operators and retailers who offer to redeem stamps for their merchandise, in determining whether they were unfair within Section 5. There is, moreover, "warrant in the record" for its conclusions that the practices are unfair because they deprive consumers of full benefit from the trading stamps they receive and unreasonably prevent stamp exchange oper-

ators and retailers who redeem stamps from engaging in legitimate business conduct.

A. *Consumers.* The Commission's basic conclusion with respect to the harm to consumers is that respondent's restrictive policy deprived them of "the * * * freedom of choice in the disposition of trading stamps" they otherwise would have (App. I, 176). The record fully details the many important reasons why consumers desire to exchange or redeem stamps they have received by means other than those which S&H has authorized (see pp. 8-10, *supra*). By foreclosing those alternatives, S&H simply prevents consumers from obtaining full value from the stamps they receive.

Because of the widespread use of trading stamps, especially by food retailers, many consumers inevitably receive them. The cost of their groceries ordinarily is higher because stamps are issued by retailers. The Commission found that the use of stamps "affect[s] price behavior" and that their use, along with other forms of nonprice competition, has increased historically as price competition has decreased (App. I, 112-113). Regardless of whether the cost of the various means of nonprice competition are, for accounting purposes, allocated to cost of goods sold or to overhead, they are expenses which must be passed on to consumers if the retailer is to make the same profit.

The consumer, if he is to obtain full benefit from his expenditures, must use the services he is offered. He must, in other words, collect stamps and redeem them. Yet many stamps are not redeemed—14 per

cent of all those issued between 1914 and 1964, the equivalent of 130 million books (App. I, 109, 141). The economic consequence of this, from the consumer standpoint, was well summarized by Dr. Stewart Lee, a professor of economics and business administration: "The lack of redemption means that the consumers are not getting full value for the expenditures of their dollars in the marketplace, because she is paying for something, if she gets stamps, and if they are not redeemed, then she is not getting full value" (App. III, 282). See also Comments, *Trading Stamps*, 37 N.Y.U. L. Rev. 1090, 1094-1095. Even those who do redeem their stamps often could have obtained merchandise which they preferred to that available from respondent's redemption centers, or derived other benefits from free and open redemption and exchange.

It is true that retailers provide other services to their customers, like free parking, which the customer must use in the prescribed manner, if at all. Trading stamps bear similarities to these services. But they are also significantly different. For a market has developed in part, no doubt, because of the "price-like * * * nature" of stamps (App. I, 113), through which the customer can make fuller use of them and, as the Commission held, there is no justification for arbitrarily suppressing this market to the consumers' detriment. See point III, *infra*, pp. 31-38.

B. *Trading Stamp Exchanges.* S&H's policy of suppressing trading stamp exchanges "tended to eliminate the operations of a whole class of businessmen who provided * * * a useful and valuable function" (App. I, 177). As the country's largest trading

stamp company, respondent's stamps are collected by 60 percent of American households (App. III, 264), and are the brand most in demand at trading stamp exchanges (App. III, 17). When those stamps may not be traded, exchanges generally suffer a 40 to 60 percent drop in business (App. I, 176-177). S&H thus has, as the Commission concluded (App. I, 177) and as Judge Wisdom noted in dissent, "virtual monopoly power over the existence of the small trading stamp exchanges which were unable to operate effectively without S&H stamps." (App. III, 401, n. 10).

The court of appeals evidently recognized the effect of S&H's practices on stamp exchanges, but insisted that "the Commission cannot rest its case solely on the determination that injury to a competitor exists" (App. III, 391). The Commission's case was not, however, based on that factor alone, for, as it found, there was also injury to consumers whose free choice in redemption and exchange was inhibited. Cf. *United States* v. *General Motors Corp.*, 384 U.S. 127, 140, 144. Indeed, it is the consumer, as a practical matter, who is ultimately harmed by traditional antitrust violations. Even in assessing the reasonableness of respondent's conduct toward trading stamp exchanges, moreover, the court below erred in rejecting the Commission's conclusion,—which, as we argue below, was supported by the record—that its business justifications were insubstantial.

C. *Retail Merchants.* Retail merchants who offer merchandise for trading stamps similarly perform a valuable service to the consuming public. By offering to redeem stamps, they also meet competition from

the closed trading stamp system. Some retailers evidently seek to attract customers away from competitors, who issue stamps by offering to redeem them (App. I, 178). Others, who sell merchandise similar to that offered by the stamp company redemption centers, offer their merchandise in exchange for trading stamps in order to compete with those centers (App. I, 177). The Commission concluded that S&H restrains trade by "prevent[ing] any such competitive reaction" (App. I, 178). The court below, as it did with respect to trading stamp exchanges, erroneously ignored the value to consumers of retailer redemption and inaccurately and impermissibly weighed the anticompetitive impact of respondent's suppression policy against the asserted justifications for it in rejecting the Commission's findings.

III. Neither Respondent's Business Justification For Its Practices Nor Decisions Sustaining Those Practices Under State Law Invalidates The Commission's Conclusion That The Practices Are Unfair.

Respondent has offered two related justifications for its practice of suppressing free and open redemption and exchange of its trading stamps—that it is necessary to the success of its business and that the activities of trading stamp exchanges have repeatedly been prohibited under state law. The Commission properly rejected both justifications and the court of appeals erred in its assessment of them.

A. *Business Justification.* Respondent's primary concern is the effect it fears free and open redemption and exchange will have upon the willingness of

retailers to purchase green stamps and issue them to their customers. Its argument is as follows (App. I, 172; III, 310-311): The greater the likelihood that consumers will patronize stores because they issue green stamps, the more attractive stamps become to the retailer. To increase consumer patronage of retailers who issue green stamps, respondent attempts to restrict the means by which they may be obtained and redeemed. It limits the number of licensees in a given geographic area, and suppresses trading stamp exchanges. The consumer may thus obtain green stamps in a limited number of outlets. Respondent requires the consumer to collect a full book before she may obtain merchandise and requires her to redeem stamps at its centers. Thus, once the consumer begins to receive stamps she must return to retailers who issue them in order to collect enough stamps to redeem. When she does redeem them, at an S&H redemption center, the quality of the merchandise obtained and the attractiveness of the center will prompt her to resume the cycle of saving green stamps.

The purpose of S&H's restrictive system, then, is to control the consumer's collection and redemption of stamps in order to make participation in that system more attractive to retailers.

As the Commission pointed out, however, there were no "hard facts" to support the assertion that respondent's restrictive policies were necessary for legitimate business reasons (App. I, 172). Respondent produced no licensee who testified that he lost business because of a stamp exchange, or because another retailer of-

fered merchandise for stamps.[13] None of the twelve major supermarket chains which account for approximately one-third of S&H's revenue (App. I, 107-108), indicated that it had been injured by the exchange. No S&H employee testified about licensee complaints. To the contrary, S&H executives were unable to specify any instances of "complaints from a licensee in respect to unauthorized redemption or a trading stamp exchange" that were brought to their attention (App. II, 442-443, App. III, 317-318).

The Commission noted that the paucity of evidence on the effect of free and open redemption and exchange was largely due to respondent's success in "regularly" suppressing "trading stamp exchanges and other redemption activities" (App. I, 172). But the evidence that was presented suggested that respondent's business would not be harmed by elimination of its restrictive policies. The Commission noted that S&H's business apparently had increased in the one area, Texas and Oklahoma, "where trading stamp exchanges did do business with some regularity before their operations were curtailed" (App. I, 172-

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[13] One S&H food retailer licensee, testifying about a competitor who offered to exchange S&H stamps for his own stamps, was unable to say "that we lost a single customer" because of the promotion (App. III, 375). Another S&H food retailer licensee, who testified about the detrimental effect trading stamp exchanges would have, admitted that he had never had any experience with such exchanges, did not know where any trading stamp exchange was located, and could not recall anyone, other than counsel for S&H, with whom he had ever discussed these exchanges (App. III, 324-326).

173). The Commission also stressed that S&H permits private swapping on request, and encourages charitable pooling of stamps—activities which, like operation of stamp exchanges, do not result in customer visits to the S&H redemption center or in "remembrance value" from durable goods they have obtained by use of stamps they have received (App. I, 173). Indeed, as it found, 20 per cent of stamp savers swapped informally apparently without "damaging * * * respondent's business" (App. I, 173). Moreover, respondent stated in a prospectus covering a stock offering that state laws requiring it to give the collector the option of redeeming stamps for cash have not "materially affect[ed] its business" (App. II, 576-577).

The Commission also correctly concluded, "upon a more general basis that respondent's business would not be seriously affected" (App. I, 173). Green stamps are the most popular brand, but neither their popularity nor the policy of restricting the outlets from which they may be obtained has caused consumers generally to pattern their shopping in order to obtain them. A survey conducted for S&H reveals that factors other than the availability of stamps are more significant in influencing shoppers' choice of retailers (App. II, 513-525). The large majority of stamp savers collect more than the one brand (App. II, 525). Approximately one-third of the people surveyed save whatever stamps they happen to get where they shop; about an equal number like receiving and redeeming stamps, but would not make special efforts to obtain them. Only about 16 percent would go out of their way to get the stamps they save (App. II, 517).

When asked why they shop at a particular food store, consumers gave low priority to the availability of stamps. More than half of them were primarily influenced by the meat department; 43 percent were concerned with the variety of items, or the fruit and vegetable department, and more than 30 percent with the prices charged. Twenty-four percent listed, as essential, that the store give the brand of stamps they save (*id.*, 518); 19 percent listed this factor as important, but not essential (*id.*, 519). Similarly, the availability of stamps played a comparatively minor role in influencing consumer choice of a pharmacy (*id.*, 520) or gasoline service station (*id.*, 521-522), two other major outlets for S&H stamps (App. I, 107).

The conclusions of this study are confirmed by the consumer testimony presented in this case. Witnesses generally accumulated more than one brand of stamps by shopping at several different stores, and their choice of stores was based on factors other than stamps. See App. II, 490-492; App. III, 47-49, 61-63, 79-80, 88-90, 140-141.

Other aspects of S&H's operation, such as the quality of its merchandise and its nationwide operations, thus probably are more responsible for the popularity of green stamps than respondent's policy of limiting the means by which they can be obtained. There is no reason to believe that these elements of its business will be impaired by preventing respondent from suppressing free and open redemption and exchange of its stamps or that their popularity with consumers will diminish as a result. So long as saving green

stamps is attractive to consumers because they are useful, consumers will have an incentive to obtain them for redemption in cash or merchandise. And, if they are most in demand, they will be the most expensive at stamp exchanges and presumably bring the highest value per book upon redemption.[14]

There is one obvious advantage to S&H and other stamp companies in restricting free redemption and exchange—the profit in "wasted" stamps or those whose redemption is substantially delayed. S&H operates on the assumption that 95 percent of its stamps will be redeemed. It theoretically passes on the value of the five percent of unredeemed stamps to the purchasing retailers and redeeming consumer (App. III, 295-296). But the record shows, and the Commission found, that a greater percentage of stamps is not redeemed, perhaps as much as 14 percent (App. I, 109, 141), the equivalent of 130 million books. The revenue from sale to retailers of these stamps is profit to S&H.

It is, moreover, advantageous to stamp companies to postpone redemption of stamps that ultimately are

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[14] S&H appears consistently to have assumed that, at an exchange, its stamps would trade for other stamps in a one-to-one ratio. But if green stamps are in greatest demand, their greater value will naturally raise their price relative to other stamps. The practice of stamp exchanges confirms this, since they charge more to exchange various local stamps for green stamps than vice-versa (App. III, 7, 33, 114-115, 173-174). Similarly, as the demand for and exchange price of green stamps increases, consumers will presumably have added incentive to seek, and retailers to issue, them (see App. I, 173).

redeemed. The companies are paid for the stamps upon sale to licensees and have the full economic use of revenue from those sales for as long as the stamps are not presented for redemption.

More stamps may thus be redeemed sooner as a result of elimination of restrictions on exchange and redemption. In addition, as Judge Wisdom suggested (App. III, 397), the practical effect of prohibiting respondent's suppression of trading may be to sharpen competition among stamp companies, since the greater choice among redemption sources should prompt stamp companies to supply superior redemption merchandise. The fact that stamp companies' profits may be reduced because a larger percentage of stamps are redeemed cannot justify the restrictions. Cf. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375. Similarly, the prospect of more vigorous competition among stamp companies strongly supports eliminating those restrictions.

The Commission was, in sum, justified in concluding that respondent had no legitimate business justification for its restrictive policies and that its business reasons could not, in any event, outweigh the harm of those policies to consumers, trading stamp operators, and retailers who offer to redeem green stamps. Since, as this Court has emphasized, "[t]he precise impact of a particular practice on the trade is for the Commission, not the courts, to determine," *Federal Trade Commission* v. *Motion Picture Advertising Co.*, 344 U.S. 392, 396, see *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385,

the Commission's findings should not have been disturbed.

B. *The Impact of State Law.* The court of appeals relied heavily upon decisions under state law in which S&H had obtained injunctions, enforcing its restrictive policies, on theories of "misappropriation of good will," "tortious interference with business relations," or "unfair competition." See, *e.g.*, *Rance* v. *Sperry & Hutchinson Co.*, 410 P. 2d 859 (Okla. S. Ct.), certiorari denied, 382 U.S. 945; *Sperry & Hutchinson Co.* v. *Berkeley*, 44 Misc. 2d 331, 253 N.Y.S. 2d 700 (Sup. Ct.), affirmed, 22 App. Div. 2d 762, 254 N.Y.S. 2d 231 (4th Dept.), appeal denied, 15 N.Y. 2d 486, 207 N.E. 2d 622. That reliance was misplaced.

The Commission's authority under Section 5 is not restricted by state or common law of unfair competition. It has long been recognized that federal regulatory authority is not necessarily bound by inconsistent state law. See, *e.g.*, *Campbell* v. *Hussey*, 368 U.S. 297; *Schwabacher* v. *United States*, 334 U.S. 182. It is equally well established that paramount considerations of federal policy may override even the clearest state or common law doctrines. See *Lear* v. *Adkins*, 395 U.S. 653; cf. *Compco Corp.* v. *Day-Brite Lighting*, 376 U.S. 234; *Sears, Roebuck & Co.* v. *Stiffel*, 376 U.S. 225; *United States* v. *Mitchell*, No. 798, Oct. Term, 1970, decided June 7, 1971. These principles are fully applicable to the Commission, which has been invested by Congress with broadly creative powers to enforce federal policy regarding unfair trade practices. See *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310; *Peerless Products, Inc.* v. *Federal Trade Commission*,

284 F. 2d 825 (C.A. 7), certiorari denied, 365 U.S. 844.

State policy may, of course, be a factor to be considered along with other aspects of the public interest in applying Section 5. Cf. *Asheville Tobacco Board of Trade* v. *Federal Trade Commission*, 263 F. 2d 502, 512 (C.A. 4). The Commission was aware, in this case, of the various state law decisions. But it properly recognized that its responsibility under Section 5 was not merely to determine the rights of parties to private litigation, as had courts under state law, but more broadly to assess the public interest, including the interests of consumers who had not been represented in the private suits. Under that standard, it properly concluded that those decisions, and the interests of respondent which they uphold, were not sufficient to overcome the public interest in free and open redemption of trading stamps (App. I, 149).

There is, moreover, no uniform policy among the states approving restrictions on the use of trading stamps. To the contrary, trading stamps have had a "checkered career." *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Association, Inc.*, 360 U.S. 334, 338. They have long been the subject of restrictive legislation, the constitutionality of which this Court has upheld. See *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342;[15] *Tanner* v. *Little*, 240 U.S. 369; *Pitney* v. *Washington*, 240 U.S. 387.

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[15] In *Rast* the Court described trading stamps in these words: "[t]hey tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence." 240 U.S. at 365.

Kansas presently prohibits the issuance of trading stamps altogether. Wisconsin and Wyoming allow redemption of stamps in cash only; Washington achieves the same result by imposing a prohibitive tax on merchants who use, and trading stamp companies which supply, stamps redeemable in merchandise. Sixteen other states require the stamp saver to be given an option to redeem stamps in cash. All these states, except Wyoming, require that the stamp saver be allowed to redeem less than a full book for cash (App. I, 108; App. II at 576).[15] Two states, on the other hand, prohibit the issuance or redemption of stamps without the company's approval. See Cal. Business and Professional Code § 17761 (West Ann., 1964); N. J. Stat. Ann § 45:23-11 (Supp. 1970).

Nor is it clear that the various judicial decisions support the restrictions on redemption and exchange involved here as strongly as respondent contends. Of the 43 cases brought to enjoin "unauthorized" use of stamps which it lists (App. II, 588-592), 32 are unreported, unappealed trial court decisions, an undetermined number of which represent merely a consent judgment.[16] It is similarly not possible to determine

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[16] S&H lists, for example, *Sperry & Hutchinson Co.* v. *Savin*, where judgment was entered without consideration of the merits by the court, and by stipulation of the defendant. See App. II at 290-293. See also *Sperry & Hutchinson Co.* v. *Walker*, App. II at 553, where the decree begins by noting that the defendants admitted S&H was entitled to an injunction. Such judgments may well reflect the leverage which S&H possesses because of its ability to bear the costs of litigation. This leverage also enables S&H to terminate unauthorized redemption activities merely by the threat of suit. An

how many of these unreported cases involve reissuance of trading stamps by merchants who purchased them from someone other than S&H.

Most of the reported cases listed by S&H involve reissuance. *E.g.*, *Sperry & Hutchinson Co.* v. *Fenster*, 219 Fed. 755, 757 (E.D.N.Y.); *Sperry & Hutchinson Co.* v. *Louis Weber & Co.*, 161 Fed. 219 (C.A. 7); *Sperry & Hutchinson* v. *Mechanics' Clothing Co.*, 128 Fed. 800 (C.A. 1). Some even suggest that the result would be different if the party enjoined had been seeking merely to transfer the right to redeem the stamps, rather than attempting to use them to attract customers. See *Sperry & Hutchinson Co.* v. *Fenster*, *supra*, 219 Fed. at 757; *Sperry & Hutchinson Co.* v. *Mechanics' Clothing Co.*, *supra*, 128 Fed. at 803; cf. *Sperry & Hutchinson Co.* v. *Hertzberg*, 69 N.J. Eq. 264, 60 Atl. 368 (Ct. Ch.) (rejecting even restrictions on right to reissue). Even the

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attorney in Memphis, Tennessee, advising S&H counsel of his client's capitulation, stated (App. II, 319):

> * * * I stated to him in all frankness I felt we could win the lawsuit since after people get their stamps, they are at liberty to do what they want with them as they are in no way a party to any contract between the stamp company and its franchise holders.
>
> After giving consideration to what the probable cost might be to him and especially since he is a small operator, he has authorized me to state that he was pulling down his sign about exchanging stamps * * *.
>
> Frankly, I wish that I could get ahold [sic] of a client large enough and wealthy enough to try this thing out * * *.

See also App. II, 262. This factor is also recognized by counsel for S&H (App. II, 273).

two cases which clearly deal with trading stamp exchanges, while failing to take the interests of the consuming public into consideration, rely heavily upon the unfair aspects of reissuance. See *Sperry & Hutchinson Co.* v. *Berkeley, supra*; *Rance* v. *Sperry & Hutchinson Co., supra.*

Restrictions on reissuance are not, however, an issue in this case (App. I, 169). The Commission recognized the distinction between reissuance and redemption and exchange. Under its order, S&H is not foreclosed from preventing a non-licensed retailer from acquiring S&H stamps in order to redispense them to its customers in connection with the sale of goods and services (App. I, 128).

The lack of a uniform state policy approving restrictions on redemption and exchange of trading stamps thus further supports the Commission's conclusion (App. I, 149) that state court decisions prohibiting such redemption and exchange did not bar it, under Section 5 of the Federal Trade Commission Act, from preventing those restrictions because they are unfair and contrary to the public interest.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for entry of a judgment enforcing the Commission's order.

Respectfully submitted.

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